SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 146.

ALABAMA PUBLIC SERVICE COMMISSION et als.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court
for the Middle District of Alabama.

BRIEF FOR THE APPELLANTS.

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Cases Cited.

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OPINION BELOW.

This case is reported below as **Southern Railway Co. v. Alabama Public Service Commission et als.**, 88 F. Supp. 441.

JURISDICTION.

The jurisdiction of this Court is based upon 28 U. S. C. 1253 and 2101 (b), providing for direct appeal to the Supreme Court of the United States within sixty days from an order granting or denying an interlocutory or permanent injunction in any case required to be determined by a district court of three judges, this being an appeal from the granting of an injunction by a three-judge District Court specially constituted under 28 U. S. C. 2281 and 2284.

QUESTIONS PRESENTED.

A special three-judge District Court was constituted under 28 U. S. C. 2281 and 2284, which sections related to injunction against enforcement of state statutes or orders of state administrative agencies alleged to be unconstitutional.

1. Should such court enjoin enforcement of criminal laws of a state against a railroad which has violated an order of the state Public Service Commission directing it to comply with state statutes requiring that trains may not be taken out of operation without authority from the Commission, if the only possible injury to the railway is the consequence of its willful and continuing violation of law, and the Commission has made no move toward enforcement of the criminal law except to point out one of the applicable criminal penalties?

2. Does such court have jurisdiction to enjoin enforcement of statutes not identified or attacked as unconstitutional or of common law remedies such as mandamus?

3. Does such court have jurisdiction where plaintiff makes only a colorable attack on the constitutionality of

a statute and does not pray for relief from enforcement of such statute, and does not seek relief from the order attacked as unconstitutional, but from all penalties and remedies known to the law of the state?

4. Should such court abstain from exercising its jurisdiction where

(a) To exercise it will be to appraise and supervise state policy as carried out by a state administrative agency in terms of local needs and in accord with local law?

(b) Where authoritative interpretation of state statutes should be awaited?

(c) To await state action which may make unnecessary a decision on constitutional issues?

STATUTES INVOLVED.

The statutes involved are printed in Appendix A.

SPECIFICATION OF ERRORS.

1. The lower court erred in overruling and denying the motion of the defendants to dismiss the action, which motion was filed on, to-wit, the 14th day of December, 1949, and was overruled and denied on, to-wit, the 13th day of February, 1950.

2. The lower court erred in overruling and denying the motion of the defendants to stay the action, pending determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint, which motion to stay was filed in this cause on, to-wit, the 12th day of January, 1950, and was overruled and denied by the court on, to-wit, the 13th day of February, 1950.

3. The lower court erred in rendering the final decree rendered on, to-wit, the 13th day of February, 1950.

4. The lower court erred in assuming and exercising jurisdiction of this cause.

5. The lower court erred in proceeding with the hearing of this cause prior to the determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint.

6. The court erred in vacating and declaring null and void and of no effect the order of the defendant Alabama Public Service Commission dated December 5, 1949.

7. The court erred in vacating and declaring null and void and of no effect the order of the Alabama Public Service Commission dated January 9, 1950.

8. The court erred in decreeing that the permanent injunction be issued, enjoining the defendants, and each of them, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of the orders of the Alabama Public Service Commission dated December 5, 1949, and January 9, 1950, or of either of them, or to enforce any penalties or other remedies against the plaintiff, its officers, agents, or employees, on account of the failure to observe the provisions of said orders, or either of them, by discontinuing and not restoring the operation of plaintiff's local passenger trains Nos. 11 and 16 between Birmingham, Alabama, and the Alabama-Mississippi state line.

STATEMENT OF THE CASE.

Appellee, hereinafter referred to as Southern, has operated trains between Birmingham, Alabama, and Columbus, Mississippi, and between Sheffield, Alabama, and Chattanooga, Tennessee, as a part of its railroad system. This case, No. 146, relates to the Birmingham-Columbus trains, while the companion case before this Court, No. 395, deals with the Sheffield-Chattanooga trains. All these trains are subject to regulation by the Alabama Public Service Commission insofar as they operate within the State of Alabama.

Trains 11 and 16 between Birmingham and Columbus were taken out of operation on October 25, 1949, in compliance with Service Order 843 of the Interstate Commerce Commission relating to the conservation of coal (R. p. 19). Prior to this time, in September, 1948, Southern had filed with the Alabama Public Service Commission an application for authority to discontinue the operation of these two trains (R. pp. 14-18). While the trains were inoperative Southern amended its petition requesting that it not be required to restore the operation of the trains (R. pp. 21-25). The petition as amended was set for hearing in Fayette, Alabama, on December 8, 1949.

Service Order 843-A of the Interstate Commerce Commission vacated and set aside Order 843 as of November 20, 1949 (R. pp. 26-27). Prior to the termination of the effective period of Order 843 the Commission had notified Southern, along with every other railroad company operating in the State of Alabama, that all trains removed under authority of Order 843 should be restored to service within twenty-four hours after the Order terminated (R. p. 26). After November 20, 1949, the Commission learned that operation of the Birmingham-Columbus trains had not been resumed. The President of the Commission

promptly wired Southern asking whether it intended to restore the trains immediately, and if not to supply the Commission with its authority for failing to restore them (R. p. 28). On November 22nd, R. K. McClain, Assistant Vice-President of Southern, wired the Commission that it did not intend to put the trains back in service (R. p. 30):

> "With all due regard for the Commission, it is not our intention to restore the operation of trains 11 and 16 until we are offered a hearing and decision on our supplemental petition for authority to keep them out of service stop Please be assured that our position is in no sense arbitrary or defiant but is we believe the only sound one we can properly take stop."

Immediately upon receipt of the refusal the Commission issued a citation to show cause, if any, why it should not enter of record an order specifying that the failure or refusal to restore the trains constituted a violation of the provisions of Title 48, Code of Alabama, 1940, and requiring that the violation be discontinued (R. pp. 31-33). The matter was set for hearing on November 25, 1949, and after such hearing the Commission issued an order dated December 5, 1949, finding that Southern's action did constitute a violation of Title 48 and ordering that the railway immediately discontinue the violation of law by restoring the operation of the two trains (R. pp. 33-37). The same order directed the attention of Southern to one of the penalty provisions of the Alabama Code:

> "It is further ordered by the Commission that the attention of the respondent Southern Railway Company be directed to Section 399 of Title 48 of the 1940 Code of Alabama, which provides in part that any utility doing business in this State which knowingly or willfully violates any lawful order of this Commission shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $1,000.00 for each offense, and that in the case of a

violation of this Commission's orders each day's violation shall be deemed to be a separate offense."

The complaint in this action was filed on December 6, 1949, and a temporary restraining order was issued the same day (R. pp. 40-42) which specifically authorized, though it did not require, that the hearing on the petition for discontinuance, set for December 8, could proceed. Such hearing took place and an order, dated January 9, 1950, was issued (R. pp. 54-63) giving the opinion of the Commission that public convenience and necessity required the operation of the trains and that with the exercise of economy and experimentation with new and different devices and methods Southern could meet the public need without fear of a burdensome operation. Authority to discontinue the operation of the two trains was denied. Defendants filed a motion to dismiss (R. p. 43). Plaintiff amended its complaint to set up the order of January 9th (R. p. 46), and defendants thereupon amended the motion to dismiss (R. p. 47). Defendants also filed a motion to stay (R. p. 48) and an answer (R. p. 49).

A statutory three-judge District Court was convened, and the hearing on the motions, the temporary restraining order and the permanent injunction all were held at the same time on January 12, 1950. The Court issued a decree (R. p. 69) denying the motions to dismiss and to stay, declaring the orders of December 5th and January 9th to be vacated, null and void, and issued a permanent injunction restraining the defendants from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees to enforce the provisions of the orders or to enforce any penalties or other remedies against the plaintiff, its officers, agents or employees on account of failure to observe the provisions of the orders by discontinuing and not restoring the operation of the trains.

It is from this decree that this appeal is taken.

BRIEF OF THE ARGUMENT.

I.

A Federal Court Should Decline to Enjoin Enforcement of the Criminal Law of the State of Alabama.

Southern sought and obtained in this case an injunction forbidding enforcement against it of any and all remedies known to the law of the State of Alabama, including all criminal prosecutions. Interference by a federal equity court in the processes of state criminal law can be justified only in most exceptional circumstances and upon clear showing that an injunction is necessary to prevent irreparable injury.

Beal v. Missouri Pacific R. R. Corp., 312 U. S. 45, 61 S. Ct. 418 (1941).

The threatened injury must be great and immediate.

Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877 (1943);

Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 55 S. Ct. 678 (1935).

There was no injury here from operation of trains for they had been kept out of operation in violation of law. The only possible injury was from the consequences of Southern's own willful and continuing violation of the laws of the State.

Beal v. Missouri Pacific R. R. Corp., supra;
Douglas v. City of Jeannette, supra.

A federal equity court should not intervene where lawfulness or constitutionality of a statute or order may be determined as readily in a criminal case as in a suit for an injunction. The questions raised before the federal district court should have been raised as a defense had any

criminal case been brought in the courts in the State of Alabama.

Douglas v. City of Jeannette, supra;
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962 (1941);
Spielman Motor Sales Co. v. Dodge, supra.

There was no threat of multiplicity of prosecutions here, in fact there was no threat at all since the Commission only pointed out to Southern one of the penalty provisions which might apply to it as a consequence of its violation of the law. This is less than has been held to constitute a threat of criminal prosecution in other cases.

Watson v. Buck, supra.

Even if the action of the Commission were interpreted as a threat there was no showing that more than one prosecution was threatened.

Beal v. Missouri Pacific R. R. Corp., supra.

If there was threatened multiplicity of actions, the multiplicity arose solely out of Southern's willful and continued wrong doing.

Cf. **Ex Parte Young,** 209 U. S. 123, 28 S. Ct. 441 (1907);
Cf. **A. F. L. v. Watson,** 327 U. S. 582, 66 S. Ct. 761 (1946).

The result of the two Southern cases (No. 146 and No. 395) taken together, is to make the Alabama Public Service Commission powerless to keep trains operating in the State of Alabama.

II.

The Three-Judge Federal District Court Had No Jurisdiction of This Cause.

The jurisdictional requirements of 28 U. S. C. 2281 were not met as to any **statute** of the State of Alabama since

the attack on the Alabama statutes was colorable and not seriously contended for nor ruled upon and relief was not asked from the statutes.

Nor were such jurisdictional requirements met as to any order of the Commission since relief was not sought from the order but from all penalties and remedies known to the Alabama law. The relief given by the District Court was not extraordinary relief but exactly that prayed for. The relief given by the Court could not supply it with jurisdiction which it originally lacked.

Jurisdiction of the three-judge district court is strictly limited and should not be lightly extended.

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386, 54 S. Ct. 732 (1934);
Phillips v. U. S., 312 U. S. 246, 61 S. Ct. 480 (1941).

The real complaint of Southern is against Alabama statutes, which it did not attack substantially.

A particular kind of order is here involved, i. e., orders which expressly or in effect direct compliance with the statutes, in contrast to orders issued by administrative agencies pursuant to authority given by an underlying statute as in **Oklahoma Natural Gas Co. v. Russell**, 281 U. S. 290, 43 S. Ct. 353 (1923).

III.

The Federal Court Should Abstain From Exercising Jurisdiction of Matters Properly Decided by State Courts.

Whether this case was within the jurisdiction of a three-judge district court or should have been before a one-judge court, any federal court should have abstained from exercising jurisdiction since the matter involved was one properly decided first by courts of the State of Alabama.

The predominant reason behind three-judge court legislation was a congressional purpose to avoid unnecessary interference with laws of a sovereign state, hence there must be exceptional circumstances before the federal judiciary should intervene.

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 69 S. Ct. 606 (1949).

There is a congressional requirement of strict construction of this legislation to protect the effectiveness of the federal judiciary and the appellate docket of the Supreme Court.

Phillips v. U. S., 312 U. S. 246, 61 S. Ct. 480 (1941); **Stainback v. Mo Hock Ke Lok Po, supra.**

The trend of federal legislation and of the decisions of the Supreme Court has been to confine within narrow limits the power of federal courts to interfere with state courts and state action through injunction.

Moore, **Commentary on the U. S. Judicial Code** (Bender, 1949), pp. 54, 400.

There are numerous areas in which a federal equity court may decline to exercise its jurisdiction concerning state affairs. See the full discussion in **Meredith v. City of Winter Haven**, 320 U. S. 228, 64 S. Ct. 7 (1943), and Moore, **supra**, pp. 400-402. The areas of especial pertinence here are:

Where exercise of jurisdiction will result in appraisal or shaping of domestic policy of the state governing its administrative agencies.

Where authoritative state interpretation of a statute will be awaited to avoid possible decisional conflict, especially where the statute is complex.

Where state action will be awaited because a decision on constitutional issues thereby may become unnecessary.

In this case federal courts have stepped in to govern policy of the state of Alabama as carried out through the Public Service Commission. These two cases (Nos. 146 and 395) are merely the first two of six which have already been filed in the same federal judicial district with at least two of the same three judges sitting on each case, all concerned with injunctions against enforcement of orders of the Public Service Commission relating to discontinuance of local train service. This has been done prior to a definitive ruling from an Alabama court on whether the Commission's present definition and application of "public convenience and necessity" is proper and correct.

The Commission is dealing with a problem little less complex than that of oil proration in **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570, 61 S. Ct. 343 (1941). Regulation of local train service must be constantly readjusted and before any decision is reached an open hearing in the affected communities must be held.

Railroad Commission v. Pullman Company, 312 U. S. 496, 61 S. Ct. 643 (1941), and **Burford v. Sun Oil Company**, 319 U. S. 315, 63 S. Ct. 1098 (1943), control the situation presented by these cases, where the same sort of local administrative problems are involved.

The District Court should have stayed exercise of its jurisdiction pending authoritative interpretation by the Alabama courts of the Alabama statutes concerning public convenience and necessity.

Shipman v. DuPre, 339 U. S. 321, 70 S. Ct. 640 (1950);
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962 (1941);
Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643 (1941);
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986 (1942);
A. F. L. v. Watson, 327 U. S. 582, 66 S. Ct. 761 (1946).

Likewise the court should have stayed its hand pending state action since a decision on constitutional grounds might have been avoided. The constitutionality of Sections 35 and 106 of Title 48, Code of Alabama, 1940, and of various applicable penalty provisions of Title 48, if ruled on first by the Supreme Court of Alabama might end this case. Also, if the Commission's order was unwarranted under Alabama standards of public convenience and necessity, then the case would end.

A. F. L. v. Watson, supra;
Spector Motor Service v. McLaughlin, 323 U. S. 101; 65 S. Ct. 152 (1944);
Chicago v. Fieldcrest Dairies, supra;
Railroad Commission v. Pullman Co., supra.

ARGUMENT.

I.

A Federal Court Should Decline to Enjoin Enforcement of the Criminal Laws of the State of Alabama.

Southern sought and obtained in this case an injunction forbidding enforcement against it of any and all remedies known to the law of the State of Alabama, including all criminal prosecutions. The Alabama law gives the Public Service Commission no power of its own to enforce its orders or the underlying statutes, and it is necessary that it turn to the Courts for enforcement.

Interference by a federal equity court in the processes of state criminal law can be justified only in most exceptional circumstances and upon clear showing that an injunction is necessary to prevent irreparable injury. In the exercise of sound discretion a federal court of equity must have scrupulous regard for the rightful independence of state governments.

Beal v. Missouri Pacific R. R. Corp., 312 U. S. 45, 61 S. Ct. 418 (1941).

The threatened injury must be both "great and immediate," otherwise the accused should set up his defense in State court, even though the validity of a statute is challenged, for there is ample opportunity for ultimate review by the Supreme Court of the United States of the questions which may be involved.

Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877 (1943);

Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 55 S. Ct. 678 (1935).

There was no possible injury in this case from operation of the trains involved for they were not running when the case was filed; in the teeth of the Alabama law Southern had refused to restore them to service after the Interstate Commerce Commission had lifted its restrictions on operations of coal burning trains (R. pp. 29-30). The only exceptional circumstance or injury involved was possible use by the Commission of provisions of the Alabama law whereby its orders can be enforced—several sections of the Alabama Code relate to penalties but exactly which apply is not clear.

> Title 48, Sections 110, 399, 400, 405; Code of Alabama 1940.

And the order of the Commission directing that the trains be restored to service could have been superseded in the Circuit Court on appeal so that the trains would have been out of operation during appellate review.

> Title 48, Section 81, Code of Alabama 1940.

The Public Service Commission issued a formal citation (R. pp. 33-37) ordering Southern to restore the trains and calling attention to provisions of Title 48, Section 399, wherein officers, agents and employees of a carrier which violates an order of the Commission are guilty of a misdemeanor and subject to fine, and each violation of the order is deemed a separate offense (R. p. 36). The three-judge court interpreted this as a threat to invoke penalties of law (R. p. 68).

In the Beal case, supra, the lower court found danger of irreparable injury in the threat of multiplicity of prosecutions and risk of large aggregate fines. This Honorable Court held (312 U. S. at 50, 61 S. Ct. at 421):

> "But whether more than one criminal prosecution is threatened was by the pleadings made an issue of

fact which the district court did not resolve. If it had been found after a hearing, as the answer alleges, that only a single suit is contemplated, we could not say that any such irreparable injury is threatened as would justify staying the prosecution and withdrawing the determination of the legal question from the state courts, whose appointed function is to decide it. Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 287, 29 S. Ct. 426, 430, 53 L. ed. 796; Spielman Motor Sales Co. v. Dodge, supra, 295 U. S. 96, 55 S. Ct. 681, 79 L. ed. 1322.

"If its decision should be favorable to respondent no reason is shown for anticipating further prosecutions. If it were adverse, penalties in large amount, it is true, might be incurred, but they may well be the consequence of violations of state law." (Emphasis supplied.)

In **Douglas v. City of Jeannette**, supra, this Court made the same point (319 U. S. at 165, 63 S. Ct. at 881-882):

"If the ordinance had been held constitutional, petitioners could not complain of penalties which would have been but the consequence of their violation of a valid state law."

Southern could suffer no injury at all except as a "consequence of violation of a valid state law," and it had deliberately set about to flaunt the law, while at the same time disclaiming its defiance (R. p. 30):

"With all due regard for the Commission, it is not our intention to restore the operation of trains 11 and 16 until we are afforded the hearing and decision on our supplementary petition for authority to keep them out of service."

There is nothing in the record to show that criminal penalties would have been invoked against Southern, but

if they had been the constitutionality of the order or statute violated could have been determined in the criminal case. Mere imminence of criminal prosecution is not a ground for equitable relief if the lawfulness or constitutionality of the statute involved may be determined as readily in the criminal case as in a suit for an injunction. In the **City of Jeannette** case, this Court held (319 U. S. at 164, 63 S. Ct. at 881):

> "It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court."

Accord: **Watson v. Buck**, 313 U. S. 387, 61 S. Ct. 962 (1941);

Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 55 S. Ct. 678 (1935).

What protection has Southern secured from a federal court that it could not have obtained in a state court in a criminal case, if brought? No protection was either given or needed as to losses from operation of the trains for the trains were not being operated. No doubt Southern will contend that a federal court could and did give relief from irreparable injury in the form of possible multiplicity of criminal actions, each day's violation being a separate offense. There are two answers to this: First, the record does not show any real and immediate danger of multiple actions. The Commission did no more than direct Southern's attention to the law (R. p. 36). The District Court found this to be a "threat . . . to invoke the penalties provided for in the Alabama statutes," even though the Commission never went beyond this mere pointing out of

the law. For a federal court to say that a duly authorized body of the state cannot even point out to a law-breaker the penalties for the crime which he is committing without thereby subjecting itself to an injunction against the enforcement of that law goes very far indeed. In **Watson v. Buck** this Court held insufficient as a basis for equitable intervention "a mere statement by a prosecuting officer that he intends to perform his duty" (313 U. S., at 400, 61 S. Ct., at 966):

> "A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity. And this is especially true where there is a complete absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute. For such a general statement is not the equivalent of a threat that prosecutions are to be begun so immediately, in such numbers, and in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts. The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraining of criminal proceedings is justified. Yet, from the lack of consideration accorded to this aspect of the complaint, both by complainants in presenting their case and by the court below in reaching a decision, it is clearly apparent that there was a failure to give proper weight to what is in our eyes an essential prerequisite to the exercise of this equitable power. The clear import of this record is that the court below thought that if a federal court finds a many-sided state crim-

inal statute unconstitutional, a mere statement by a prosecuting officer that he intends to perform his duty is sufficient justification to warrant the federal court in enjoining all state prosecuting officers from in any way enforcing the statute in question. Such, however, is not the rule."

Here no officer even went as far. Assuming the three-judge court's conclusion to be correct, the record does not show that there was a threat of more than one prosecution. If the appellants should make oppressive use of legal processes of the state, bring repeated or groundless actions, or otherwise threaten irreparable damage to Southern, then the federal courts may then be open to the railway upon its sufficiently alleging a case for equitable intervention. Second, as this Court pointed out in **Beal** and **City of Jeannette,** the threat of multiplicity of prosecutions, if there was such a threat, arises only as a consequence of plaintiff's own deliberate and willful violation of the state law. Surely no plaintiff is entitled to relief from prosecution because, and solely because, he has set in motion a planned scheme to break the criminal law as many times as possible and thus give rise to a threatened multiplicity of criminal actions against him. For a complainant to rest its claim for equity on the magnitude and number of its own wrongs would be strange law indeed.

Cf. **Ex Parte Young,** 209 U. S. 123, 28 S. Ct. 441 (1907), wherein this Court was not convinced that any employee of the railroad could be found who would be willing to violate the criminal law for a test case, and the railroad faced future operational losses on the trains.

Cf. **A. F. L. v. Watson,** 327 U. S. 582, 66 S. Ct. 761 (1946), where the threat to enforce the Florida law was "real and imminent," others similarly situated already having had proceedings brought against them.

When it is realized that there is no loss from operation of the trains the present case is no more than that involved in the **Spielman** case, "the ordinary one of a criminal prosecution which would afford appropriate opportunity for the assertion of appellant's rights."

In effect Southern has asked the federal courts to assume that the pertinent criminal penalty provisions of the Alabama Code (which it really does not seriously attack as unconstitutional) will be enforced against it in an unconstitutional manner.

The federal courts have imposed an impossible dilemma upon the administrative agencies of Alabama. Note the statement of the District Court in the second case, No. 395 (R. p. 53):

> "We are warranted in assuming that should we decline to interfere with the enforcement of the criminal laws of Alabama plaintiff would continue to operate these trains at a serious and growing loss, for while the threat of prosecution may be a goad, it is not the only inducement to law observance. Thus, it is not the threat of a multiplicity of prosecutions, but the finding of irreparable damage to plaintiff's property rights that is real, not fanciful, immediate, not remote, which moves us to grant an injunction. We know of no other manner of affording the relief to which plaintiff is entitled."

The effect of cases Nos. 146 and 395, taken together, is that if a railway operates at a loss, and continues to operate, it may seek relief in federal court on the theory that it is being deprived of property without due process, threatened multiplicity of suits being unavailable as a ground since no criminal law has been broken. Or, the railway may cease to operate, as in case 146, and since taking of property without due process is not properly

available as a ground, there being no losses from operation, await attempt by the Commission to enforce the law and rely on alleged threatened multiple criminal prosecutions. The final result is to take out of the hands of the Commission all authority to keep trains operating and to put into the carrier's hands power to make its own decisions as to what trains it shall run, ex mero motu and ex parte, and then say to the State of Alabama, "make me operate if you can, but do so at your risk for if you try it I'll have a federal suit filed."

II.

The Three-Judge Federal District Court Had No Jurisdiction of This Cause.

The three-judge district court was convened under the provisions of Title 28, U. S. C. 2281. The appellants submit that the case did not meet the jurisdictional requirements of this section and that there was no jurisdiction in a three-judge court, the matter being one within the jurisdiction of a district court of one judge only.

As appellants read Section 2281 there are three requirements which must be met before there is three-judge jurisdiction.

(a) An interlocutory or permanent injunction must be sought.

(b) The injunction must be sought on the ground that a state statute is unconstitutional [**Oklahoma Natural Gas Co. v. Russell**, 281 U. S. 290, 43 S. Ct. 353 (1923) interprets "statute" as including "order."]

(c) The injunction must seek restraint of enforcement, operation or execution of the statute or order

whose constitutionality is attacked. Appellants submit that there can be no real question of this in view of the specific language of the statute: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute (including 'order', since the **Oklahoma** case)— . . . . shall not be granted . . . . upon the ground of the unconstitutionality of **such** statute (including 'order' since the **Oklahoma** case) unless . . ."

Southern's complaint failed to meet requirements (b) and (c) as to any Alabama **statute.** The attack on the constitutionality of Title 48, Sections 35 and 106 of the Code of Alabama 1940, on the ground of unlawful delegation of power was purely colorable (R. p. 2). Southern never contended that there was any merit to this averment, submitted no evidence on it, did not argue it in briefs, and the three-judge court did not even pass on it. Nor did the prayer for relief ask relief from the statutes referred to but purported only to seek relief from the order (R. p. 13).

The complaint did meet requirement (b) as to an **order** of the Commission but it is submitted that it did not meet requirement (c). Relief was not sought in terms of the order but against enforcement of "any penalties or other remedies provided by the laws of the State of Alabama" by reason of plaintiff's or their failure "to restore the operation of said two passenger trains" . . . . as required by the order of December 5, 1949, and "as is inherent" in the order of January 9, 1950 (R. p. 47). This is a much broader field of relief than Section 2281 allows—injunction against "enforcement, operation or execution" of "such statute" (or "such order"). Southern's prayer and the Court's decree would include even common law remedies, and the statutes whose enforcement was sought to be enjoined were not even identified. The Alabama

Supreme Court has held that mandamus is a proper remedy for enforcement of the Commission's orders; apparently this also is included within the injunction.

Ala. Public Service Commission v. Western Union Telegraph Co., 208 Ala. 243, 94 So. 472 (1922).

By statute a state court can hold a violator of the Commission's orders in contempt; this also is enjoined.

Title 48, Section 78, Code of Alabama 1940.

Southern just asked for, and was granted, blanket immunity from any kind of legal process. It is submitted that this is beyond the purview of three-judge court legislation. **Oklahoma Natural Gas Co.** holds that an order can be attacked and relief sought from "such order." It does not hold that the word "such" is to be ripped out of the statute.

The theory of the District Court seemed to be that it could enjoin whatever penalties and remedies, statutory or common law, it saw fit in order to give effective relief as a duly convened court of equity. But this is "bootstrap law," since jurisdiction is conferred initially only if relief is sought from the statute (or order) whose constitutionality is questioned. The three-judge court cannot by the broad scope of its relief confer jurisdiction upon itself retrospectively, if the complaint averred no case quickening the special jurisdiction of the court. The three-judge court is of statutory creation and its jurisdiction is to be strictly limited by the statute which created it and is not to be lightly extended.

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386, 54 S. Ct. 732 (1934);
Phillips v. U. S., 312 U. S. 246, 61 S. Ct. 480 (1941).

Also the relief granted, going far beyond that authorized by Section 2281, is exactly the relief prayed for by South-

ern from the beginning. This is no case of equity giving extraordinary relief to make its decree effective where it cannot give that asked, but of equity giving exactly the relief prayed for.

Southern's real complaint is against the statutes (Title 48, Sections 35 and 106). The language of the orders is affirmative in nature but they are merely to require that the trains resume operation and that Southern put itself in compliance with the statutes. As pointed out in Stern & Grossman, **Supreme Court Practice** (Bureau of National Affairs, 1950), pp. 29-30, the three-judge court legislation might have been construed to encompass only those attacks on agency orders which were based on the invalidity of the underlying statute, but the Supreme Court has gone beyond this in the **Oklahoma** case and held an attack on the order alone to be enough. But we are here concerned with a very particular kind of order—not an order which only carries into effect a policy set by statute nor merely recites an administrative determination based on authority conferred by the statute (as the setting of rates in **Oklahoma Natural Gas Co. v. Russell, supra), but with an order whose only purpose and effect is to direct Southern to put itself in compliance with the Alabama statutes.** This was the express purpose of the order of December 5, 1949 (R. p. 36), and as Southern acknowledges, was inherent in the order of January 9, 1950 (R. p. 47).

Southern's case is no more than a contention that a valid statute has been so applied as to deprive it of its property without due process. Suppose a railway filed a petition to discontinue operations of a train, and the Commission simply took no action and issued no order. Could the railroad come before a three-judge court under Section 2281 and get affirmative relief in the form of permission to cease operation, without attacking the constitutionality of the statute which requires continued operation until au-

thority is given to halt? Southern voluntarily assumed the status of operator of a railroad and of operator of the two trains here involved and along with that it subjected itself to the law governing the manner in which it might cease operation once it had obtained a certificate of convenience and necessity. Now it has decided ex mero motu whether it shall cease operation. Obviously there is tremendous danger to orderly supervision of utilities in Alabama if a particular utility can define and decide public convenience and necessity for itself and then seek federal equitable relief because it has been ordered to stop doing so, without seeking judicial examination of the statute which is the crux of the whole matter, i. e., Sections 35 and 106.

The decision below overlooks **Ex parte Bransford**, 310 U. S. 354, 60 S. Ct. 947 (1940), where a distinction is made between the ground of unconstitutionality as applied which requires a three-judge court and the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. Southern has attacked as unconstitutional the result of an administrative act and has not attacked the statute as generally applied to petitions for discontinuance. This case also holds that the three-judge court is not required unless the action complained of is directly attributable to the statute (or, a fortiori, order). Here the penalties and remedies as to which relief is sought are not called for by the order or authorized by it, but in truth and fact are directly attributable only to the statute.

III.

The Federal Courts Should Abstain From Exercising Jurisdiction of Matters Properly Decided by State Courts.

Whether this case was within the jurisdiction of a three-judge court or should have been before a one-judge court, any federal court should have abstained from exercising its jurisdiction on a matter properly decided first by courts of the State of Alabama.

We are concerned with an area where the impact of federal action strikes deep into state affairs. Most exceptional circumstances must exist before the federal judiciary should intervene. There must be a scrupulous regard for the rightful independence of state governments, for the predominant reason behind the three-judge court legislation was a congressional purpose to avoid unnecessary interference with laws of a sovereign state.

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 69 S. Ct. 606 (1949).

And there is likewise a congressional requirement of strict construction to protect the effectiveness of the federal judiciary and the appellate docket of the Supreme Court.

Phillips v. U. S., 312 U. S. 246, 61 S. Ct. 480 (1941); **Stainback v. Mo Hock Ke Lok Po**, supra.

Professor James William Moore is to the same effect:

> "The steady trend of federal legislation has been toward the delimitation of the power of federal courts to interfere with state courts and state action through the equitable writ of injunction

"A parallel tendency to limit federal court interference with state action may be traced in the decisions of the Supreme Court."

Moore, Commentary on the U. S. Judicial Code (Bender, 1949), p. 400.

"It will be seen, therefore, that by statute and decision, the federal judicial power to interfere with the state fiscal, legislative or administrative policy had been restricted within narrow confines, and most of the litigation affecting state fiscal and utility litigation routed up through the state courts, with final appellate review by the Supreme Court of any substantial federal question, instead of allowing it to be instituted initially and proceed in the federal district courts."

Moore, supra, p. 54.

Mr. Chief Justice Stone detailed in **Meredith v. City of Winter Haven**, 320 U. S. 228, 64 S. Ct. 7 (1943), the areas in which a federal equity court may decline to exercise its jurisdiction as relating to state affairs:

State criminal prosecutions.

Collections of state taxes or fiscal affairs of the state.

State administrative function of prescribing local rates of public utilities.

Appointment of a receiver where liquidation of a state bank by a state administrative officer, if no contention that interest of creditors and stockholders will not be adequately protected.

"Similarly, it may refuse to appraise or shape domestic policy of the state governing its administrative agencies."

To this list can be added the following:

Where authoritative state interpretation of a statute will be awaited to avoid possible decisional conflict, especially where the statute is complex.

Where state action will be awaited because a decision on constitutional issues thereby may become unnecessary.

This enumeration is supplemented by various enactments which show the purpose of Congress in this field:

The Johnson Act, carried forward as 28 U. S. C. 1342 et seq., providing against injunction of state rate orders where there is plain, speedy and efficient remedy in state courts.

No jurisdiction in a district court to enjoin, suspend, or restrain assessment, levy or collection of taxes imposed under state law where there is plain, speedy and efficient remedy in state courts (Act of 1937, carried forward as 28 U. S. C. 1341).

See the similar full discussion in Moore, **Commentary on U. S. Judicial Code** (Bender, 1949), pp. 400-402.

We are dealing here with a situation where the federal courts have stepped in to appraise and shape state policy governing its administrative agencies, i. e., the Public Service Commission of the State of Alabama. The two Southern Railway cases are not isolated examples but only the precursors of a steady stream of cases which have been filed in the same federal judicial district with at least two of the same three judges sitting on each case, all concerned with injunctions against enforcement of orders of the Alabama Public Service Commission relating to discontinuance of local train service.

Atlantic Coast Line R. R. Co. v. Ala. Public Service Comm. et al., 92 F. Supp. 579 (Judges McCord, Kennamer and McDuffie);

Louisville & Nashville R. R. Co. v. Ala. Public Service Comm. et al., 93 F. Supp. 544 (Judges McCord, Kennamer and Mize);

Louisville & Nashville R. R. Co. v. Ala. Public Service Comm. et al., Case No. 711-N, U. S. Dist. Ct., Middle Dist. of Ala., set for hearing Jan. 10, 1951 (Judges McCord, Kennamer & Lynne);

Louisville & Nashville R. R. Co. v. Ala. Public Service Comm. et al., Case No. 712-N, U. S. Dist. Ct., Middle Dist. of Ala., set for a hearing Jan. 10, 1951 (Judges McCord, Kennamer and Lynne).

What began as a matter of trains 11 and 16 between Birmingham and Columbus, Mississippi, in the first Southern Railway case, is now a matter of communities all over Alabama being deprived of local train service which they formerly enjoyed, without a single ruling from an Alabama court on whether the Commissioner's definition and application of public convenience and necessity as cast in the mold of Alabama needs and demands is proper and correct and without any decision by an Alabama court on the constitutionality of the pertinent statutes.

In attempting to define and apply the formula of public convenience and necessity to diverse situations in numerous communities and give fair weight to railway income and expense both on local lines and system-wide the Commission is dealing with a problem little less complex than that of oil proration in **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570, 61 S. Ct. 343 (1941), where the Court said of the Texas Railroad Commission (311 U. S., at 575, 61 S. Ct., at 346):

> "Presumably that body, as the permanent representative of the state's regulatory relation to the oil industry equipped to deal with its ever-changing aspects, possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals.
>
> "The real answer to any claims of inequity or to any need of adjustment to shifting circumstances is

the continuing supervisory power of the expert commission."

The regulation of local train service within the framework of public convenience and necessity is subject to constant readjustment—rates and returns fluctuate, population shifts, the use of other means of transport varies. The enormous statistical and informational data which is pertinent to a determination of a particular case is in a small way shown by the voluminous exhibits in this case. In reaching a decision the Commission holds open hearings in the affected communities, something a federal equity court cannot do. It is easy to lose sight of the fact that we are dealing with exactly the sort of local matter which is best handled by an administrative agency in close contact with the local scene and best reviewed by a state court.

The **Pullman** case, **Railroad Commission v. Pullman Co.**, 312 U. S. 496, 61 S. Ct. 643 (1941), is almost a touchstone. It holds "decisive" the important considerations of federal-state policy. It points out that a state decision on the matter may mean no constitutional issue will arise. It points out that in Texas (as in Alabama, we interject) there were easy and ample means for testing the administrative agencies' authority through court review. Mr. Justice Frankfurter's conclusion was that, absent a showing that a definitive ruling could not be obtained in state courts with full protection of the constitutional claims, the District Court should stay its hand. Southern does not deny that it has ample review in Alabama courts with full protection of its rights—it simply has chosen to by-pass the local judicial machinery.

Under Title 48, Sec. 76, Code of Alabama 1940, a petitioner before the Commission may apply for a rehearing. Section 79 provides for an appeal from any final action or order of the Commission to the Circuit Court of Mont-

gomery County, in Equity, and thence to the Supreme Court of Alabama. Sections 81 and 84 provide that on such appeal the order appealed from may be stayed or superseded by the appellate court upon hearing and notice after consideration of the testimony taken before the Commission. Section 82 provides that the appellate court shall hear the case upon the certified record and shall set aside the order of the Commission if the court finds that the Commission erred to the prejudice of the appellant's substantial rights in its application of the law, or that the order was based upon findings of fact contrary to the substantial weight of the evidence; also, instead of setting aside the order the court may remand the case to the Commission for further proceedings in conformity with the direction of the Court, and in advance of judgment may remand the case to the Commission for taking of additional testimony or other proceedings. This section has been construed by the Alabama Supreme Court as affording due process under the 14th Amendment to the Constitution of the United States and as to require the appellate court, when confiscation is claimed, to review the order of the Commission both as to the law and the facts on the court's own independent judgment.

Ala. Public Service Comm. v. Sou. Bell Telephone & Telegraph Co., 42 Sou. 2nd 655 (1949);
Ala. Public Service Comm. v. Mobile Gas Co., 213 Ala. 50, 104 So. 538 (1925).

The chief rationale of the **Burford** case, **Burford v. Sun Oil Co.**, 319 U. S. 315, 63 S. Ct. 1098 (1943), is the existence of local issues which must be continuously adjusted by an administrative agency operating at the state level as a "working partner" with the state courts and in terms of state policy (319 U. S. at 332, 63 S. Ct. at 1106):

"Insofar as we have discretion to do so, we should leave these problems of Texas law to the State court

where each may be handled as 'one more item in a continuous series of adjustments.' Rowan and Nichols, supra, 310 U. S. at page 584, 60 S. Ct. at page 1025, 84 L. ed. 1368.

"These questions of regulation of the industry by the State administrative agency . . . so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them. 'Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, * * *. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts "exercising a wise discretion," restrain their authority because of a "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary * * *. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.' Railroad Commission v. Pullman Co., supra, 312 U. S. 500, 501, 61 S. Ct. 645, 85 L. ed. 971.

"The state provides a unified method for the formation of policy and determination of cases by the Commission and by the State courts. The judicial review of the Commission's decisions in the State courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Cf. Matthews v. Rodgers, 284 U. S. 521, 52 S. Ct. 217,

76 L. ed. 447. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

Just as Texas channelled all its oil proration cases through one court in search of uniformity, Alabama channels all its appeals from discontinuance orders through one court, the Circuit Court of Montgomery County.

The principle of local policy was brought out again in the **Stainback** case (336 U. S. at 383, 69 S. Ct. at 614):

> "Entirely aside from the question of the propriety of an injunction in any court, territorial like state courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction. We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course. We find no such circumstances in this case."

This Court on numerous occasions has had before it the problem of federal courts staying exercise of their jurisdiction pending authoritative interpretation by state courts of a state statute.

Shipman v. DuPre, 339 U. S. 321, 70 S. Ct. 640 (1950);
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962 (1941);
Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643 (1941);
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986 (1942);
A. F. L. v. Watson, 327 U. S. 582, 66 S. Ct. 761 (1946).

This case involves a question of Alabama statutes concerning public convenience and necessity. An interpretation by federal courts is no more than a forecast which may be displaced by subsequent interpretation by state courts in cases of similar factual settings. If the Alabama courts decide differently may Southern then be brought in and its rights relitigated or will it stand alone in contrast to others similarly situated.

In **Shipman v. DuPre**, supra, the Court held:

"Appellants sought a declaratory judgment that certain sections of the South Carolina statute . . . regulating the fisheries and shrimping industry were unconstitutional and interlocutory and permanent injunctions restraining the state officials from carrying out those provisions. The statutory three-judge District Court assumed jurisdiction, decided the issues on the merits, and dismissed the complaint. From the papers submitted on appeal, it does not appear that the statutory sections in question have as yet been construed by the state courts. We are therefore of opinion that the District Court erred in disposing of the complaint on the merits."

In the **Pullman** case Mr. Justice Frankfurter stated (312 U. S. at 499, 61 S. Ct. at 645):

"But no matter how seasoned the judgment of the District Court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the District Court but to the Supreme Court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow

by a state adjudication. Glenn v. Field Packing Co., 290 U. S. 177, 54 S. Ct. 138, 78 L. Ed. 252; Lee v. Bickell, 292 U. S. 415, 54 S. Ct. 727, 78 L. Ed. 1337. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court."

Likewise this Court has made clear its position in the matter of awaiting state action where a decision on constitutional grounds may be avoided. The constitutionality of Sections 35 and 106 and of the several applicable penalty provisions of Title 48 (Sections 110, 399, 400, 405) are questions to be ruled on first by the Supreme Court of Alabama. Such a ruling may end the matter. If under Alabama law the Commission's order was unwarranted under the Alabama standards of public convenience and necessity then the litigation ends. As this Court noted in the **Pullman** case (312 U. S. at 501, 61 S. Ct. at 645):

"If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise."

To the same effect see:

A. F. L. v. Watson, 327 U. S. 582, 66 S. Ct. 761 (1946);
Spector Motor Service v. McLaughlin, 323 U. S. 101, 65 S. Ct. 152 (1944);
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986 (1942).

The Commission's views on public convenience and necessity, not yet ruled on by the state courts, are pointed up and discussed in greater detail in the brief on Case 395.

CONCLUSION.

It is respectfully submitted that the decree of the District Court should be reversed and the cause ordered dismissed, or that the decree be reversed and the cause

ordered stayed in the District Court pending adjudication in state courts of the issues of constitutionality and statutory interpretation which are involved.

Respectfully submitted,

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I hereby certify that a copy of this brief has this day been served upon Marion Rushton, Esq., of Counsel for Appellee, this the ... day of January, 1951.

.....

Of Counsel for Appellants.

APPENDIX A.

STATUTES INVOLVED.

Title 48, Code of Alabama 1940:

Sec. 35. Abandonment of service, regulated.—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate.

Sec. 76. Rehearings.—Any time after an order has been made by the commission, any person interested therein may apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing within sixty days after the said application therefor has been filed, and such rehearing shall be subject to such rules as the commission may prescribe. Application for such rehearing shall not excuse any utility or person from complying with or obeying an order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. Any order of the commission made after such rehearing shall have the same force and effect as an original order, but shall not affect any right, or the enforcement of any right, arising from or by virtue of compliance with the original order prior to the order made after rehearing.

Sec. 78. Courts may compel compliance with orders of commission and punish failure.—In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein.

Sec. 79. Appeals from orders of commission.—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the Circuit Court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when the appellant is the State of Alabama. (1909, p. 96; 1932, Ex. Sess., p. 233.)

Sec. 81. Right to supersede order.—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for herein for superseding an order or orders of the commission.

Sec. 82. Proceedings on appeal.—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon findings of fact contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings. (1932, Ex. Sess., p. 233.)

Sec. 84. Appeal does not supersede order—supersedeas bond.—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares, charges, or any of them, or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided.

Sec. 106. Permit to abandon service.—No transportation company subject to this chapter shall abandon all or any

portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment.

Sec. 110. Repairs and improvements of facilities and property of transportation companies.—If, in the judgment of the public service commission, repairs or improvements to or changes in any trains, switches, terminals, or terminal facilities, motive power, or any other property or device used by any transportation company, subject to the supervision of the public service commission, in or in connection with the transportation of passengers, freight or property, ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers, freight, or property, the commission shall, after a hearing had either on its own motion or after complaint filed, make and enter an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every transportation company subject to the supervision of said commission shall make all such repairs, improvements, changes and additions required of it by any order of the commission served on it, and any transportation company that shall fail, refuse, omit or neglect to obey any lawful order or requirement of the public service commission, for which a penalty has not been provided, shall forfeit to the State of Alabama a sum not exceeding two thousand dollars for

each offense, to be fixed by the court or judge trying the case, and every such violation, failure, refusal, neglect, or omission, shall constitute a separate and distinct offense, and, in case of a continuing violation, each and every day's continuance thereof shall be a separate and distinct offense.

Sec. 399. Penalty for charging excessive rates, granting rebates, or violating commission's order, etc.—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense. (Ib.; 1932, Ex. Sess., p. 209.)

Sec. 400. Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.—Every officer, agent or employee of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corpora-

tion, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court. (1907, p. 23.)

Sec. 405. Violating orders of public service commission; penalty for.—Every officer, agent or employee of any common carrier or corporation, who shall violate, or who procures, aids or abets any violation of, or who shall fail to obey, observe or comply with any order of the public service commission, or any provision of any order of the Commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe any comply with any such order or provision, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense to be fixed by the court or judge trying the case.

United States Code, Title 28:

Sec. 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress,

shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

Sec. 2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

Sec. 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom

shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceedings.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the state.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application

for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State.

Reply & Suppl. Brief for the App'lants

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 146.

ALABAMA PUBLIC SERVICE COMMISSION et al.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court
for the Middle District of Alabama.

REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

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Textbook Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 146.

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vs.

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for the Middle District of Alabama.

REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

INTRODUCTORY.

Since the arguments in this reply and supplemental brief apply equally to this case, No. 146, and its companion case No. 395, the appellants herewith address these arguments to both cases. This reply brief contains two basic arguments: I. The suits below in both cases were, in substance, suits against the State of Alabama and barred by the United States Constitution, Amendment XI. II. A further elaboration of the point previously raised that the lower court in both cases should have abstained from exercising any jurisdiction in the causes.

ARGUMENT.

I.

Appellee's Suit Is, in Substance, Against the State of Alabama and Is Barred by the United States Constitution, Amendment XI.

In view of the sweeping nature of the relief granted by the three-judge district court below, appellants now urge that that court should have dismissed appellee's suit as being a suit in violation of United States Constitution, Amendment XI. That amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Appellants did not urge dismissal below on this ground specifically, although appellants' motion to dismiss raised general grounds going to the jurisdiction of the court below to hear and decide the instant cause. However, where objections to a petitioner's suit, as violative of the Eleventh Amendment, were first made and argued in the Supreme Court, after the State Attorney General had appeared in the lower federal courts and defended the suit on the merits, this Court held that the objection and argument had been made in time. **Ford Motor Co. v. Department of Treasury**, 323 U. S. 459, 467 (1945). The rationale of the opinion was that the Eleventh Amendment was an explicit limitation on federal judicial power "of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court" (323 U. S. 467). The Court stated further that the State Attorney General had no authority

to consent that the State's Eleventh Amendment immunity be waived, in the absence of explicit and general statutory authority. Thus, the following argument urging that the court below should have dismissed this cause on Eleventh Amendment grounds is proper and timely.

It is settled that absent explicit consent to suit against it in the federal court, a State may not be sued there without its consent. See: **Ford Motor Co. v. Department of Treasury**, supra; **Kennecott Copper Corp. v. State Tax Commission**, 327 U. S. 573 (1946); **Great Northern Life Insurance Co. v. Read**, 322 U. S. 47 (1944). And, if the State is the real party in interest, a suit against state officers who are merely nominal parties will not avoid the limitations of the Eleventh Amendment. See: **Ford, Read** and **Kennecott** cases, supra.

Another exception to the Eleventh Amendment prohibition occurs where the suit seeks to enjoin state officials from acting under a statute which is allegedly violative of the Federal Constitution. See: **Ex Parte Young**, 209 U. S. 123 (1908). But cf. **Beal v. Missouri Pacific R. Corp.**, 312 U. S. 45 (1941), and **Spielman Motor Sales Co. v. Dodge**, 295 U. S. 89 (1935). The theory of **Ex Parte Young** is that a state officer, seeking to enforce a state act which violates the Federal Constitution, is stripped of his official or representative character, and "is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States" (209 U. S. 160).

Mr. Justice Frankfurter, dissenting in **Larson v. Domestic and Foreign Commerce Corp.**, 337 U. S. 682, 705 (1949), at page 715, has stated:

> "The matter boils down to this. The federal courts are not barred from adjudicating a claim against a

> governmental agent who invokes statutory authority for his action if the constitutional power to give him such a claim of immunity is itself challenged."

Another instance where the Eleventh Amendment will not bar a suit against state officers is present where the state officers have exceeded their statutory authority. Cf.: **Philadelphia Co. v. Stimson**, 223 U. S. 605 (1912). Here, too, the conduct against which an injunction is sought is beyond the official powers of the defendant officers, and is, therefore, not the conduct of the sovereign state. **Larson v. Domestic etc. Corp.**, supra, at p. 690. A commentator has noted:

> ". . . the governing principle, stated generally, is that a suit against an officer, who is proceeding for either of these two purposes (i. e., to collect taxes or to promulgate regulatory administrative action) under an unconstitutional statute or in excess of his statutory authority will not be considered a suit against the government."
>
> Block, **Suits Against Government Officers and the Sovereign Immunity Doctrine** (1946), 59 Harv. L. Rev. 1060, 1076.

Southern, in the case at bar, does not come within exceptions to the limitations of the Eleventh Amendment. Alabama has not consented to be sued. Constitutional attack on the provisions of Title 48, Code of Alabama 1940, is admittedly frivolous. (See discussion in opening Brief for appellants.) Thus, Southern does not come within the exception of **Ex Parte Young**, 209 U. S. 123 (1908).

The state action which Southern seeks to have enjoined in the federal courts is potentially future action, and it is far from certain that such future action will ever be taken by state officers. Southern seeks to have enjoined the Alabama Public Service Commissioners and the Attorney

General of Alabama from proceeding in the name of the State of Alabama to enforce penalties or remedies provided under the laws of the state because of Southern's failure to continue the operation of the two trains in question. It is submitted that such an attack does not bring Southern within an exception to the Eleventh Amendment prohibition. For this potential future action which Southern seeks to have enjoined would be action by the officers as the State of Alabama. These officials would not be acting in their individual capacities.

A case in point is **Chicago R. I. and P. R. Co. v. Long et al.** (8th Cir., 1950), 181 F. 2d 295. Here the plaintiff railroad, a Delaware corporation, sued in the federal district court of Iowa against the chairman and the members of the Iowa State Commerce Commission, among others, for a declaratory judgment that an order of the Commission requiring the railroad to install, maintain and operate certain light and bell signals at a street crossing in a city in Iowa was void. The plaintiff railroad also sought to have the enforcement of the order enjoined as violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment of the Federal Constitution. The Court of Appeals of the Eighth Circuit affirmed the action of the district court in granting the defendant's motion to dismiss the complaint.

The principal discussion in the opinion concerns the propriety of the dismissal on Eleventh Amendment grounds. The Court of Appeals held that the suit was against the State, even though the members of the Iowa Commission were nominal parties defendant. The Court concluded that the State of Iowa was the real party in interest and that the action was, in fact, against the State of Iowa. The Court pointed to the section of the Iowa statute providing that orders of the Commission affecting public rights were to be enforced in the courts of Iowa in the name of

the State of Iowa (181 F. 2d 298). In Alabama, Title 48, Sec. 51, Code of Alabama 1940, provides that, unless otherwise provided, all actions to enforce penalties or forfeitures under the title (the title concerns public utilities and their regulation by the Alabama Public Service Commission) are to be brought in the name of the State in a court of competent jurisdiction in Montgomery County, Alabama. The action for recovery of any penalties is under the direction of the Attorney General [on the matter of the court of competent jurisdiction, compare **Kennecott Copper Corp. v. State Tax Commission,** 327 U. S. 573 (1946), and the Utah Statute involved in that case].

Thus, the reasoning of the Circuit Court of the Eighth Circuit in the **Long** case is apposite in the cases at bar. Clearly, the instant suit is against the State of Alabama and not against the Alabama Public Service Commissioners, and the Attorney General, as individuals stripped of official character.

The Court in the **Long** case, supra (181 F. 2d 295), was unpersuaded by the railroad's argument that the district court had jurisdiction because the order of the Commission deprived plaintiff of property in violation of the Fourteenth Amendment of the Federal Constitution (181 F. 2d 300). The Court stated, adopting the language of prior decisions of the Iowa State courts, that the order did not violate the Fourteenth Amendment since there had been no proceeding to enforce or vacate the order of the Commission.

Similarly, in the case at bar there have been no judicial attempts to enforce or vacate the order complained of. Southern's first steps in No. 146 and in No. 395 were injunction suits in a three-judge federal district court seeking a permanent injunction against the purely negative orders in question, and against the enforcement of Title 48, Code of Alabama 1940 generally. The Alabama Com-

mission had merely denied permission to discontinue a branch line.

It is submitted that the **Long** case, supra, is controlling. Although the decision is a decision of a lower federal court, the decision is a unanimous one, and is based on facts precisely similar to the facts in the cases at bar.

On analysis, it is apparent why an allegation that administrative orders violate the Federal Constitution is not enough to enable a plaintiff to avoid the limitations of the Eleventh Amendment when suing for an injunction in the federal courts against future attempted enforcement of these orders. The rationale that officers acting under an unconstitutional statute were not acting as a sovereign state is founded on the theory that the greater federal constitutional power intervenes and relegates the action of these officers to the status of the action of individuals. In short, the authority for the official action disappeared because that authority was unconstitutional and invalid and thus a nullity. However, the administrative officials at bar do not derive their power to act for a state and as a state from negative administrative actions. And no defendant has commenced enforcement proceedings in the name of the State in the Alabama courts.

A most important feature of the instant litigation demonstrates a basic reason for the existence of the Eleventh Amendment. The three-judge district court at bar has permanently enjoined the administrative officials of Alabama from taking any steps to enforce any orders, penalties or remedies against the Southern, or its officers, agents or employees regarding the discontinuance of and failure to restore the operation of the two lines in question (R. 70 for No. 146, R. 72 for No. 395). No future circumstances which may evolve; no future conditions which may exist in the territories formerly served by those lines; no future need for rail transportation along these lines in the territories

served, however great the potential patronage may be; no future burden which may be imposed on the state government or the federal government and the citizens thereof, because the lines in question have been discontinued; none of these factors will enable the State of Alabama and its administrative officials to take any action with regard to these lines. A permanent injunction stands. A greater or more undue interference with the functions and operations of state government is difficult to conceive.

> "Various reasons have been advanced from time to time in justification of denying jurisdiction to the courts in cases against sovereign states . . . . This brings us to the final explanation and the only one that seems worthy of consideration as a real policy basis for the doctrine of sovereign immunity today: it is possible that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property" (Block, **Suits Against Government Officers and Sovereign Immunity Doctrine**, supra, pp. 1060-1061).

Appellee Southern has not objected at any time during the course of this litigation to the state review procedures. The Alabama legislature, as a matter of public policy, has restricted the scope of review of the Commission's action. (See Title 48, Sec. 82, Code of Alabama 1940.) The Circuit Court may do only three things: (1) Affirm the order of the Commission; (2) set aside the order of the Commission; (3) remand the case to the Commission for further proceedings in conformity with the directions of the court. Title 48, Sec. 82, supra; **Avery Freight Lines v. Persons**, 250 Ala. 40, 32 So. 2d 886 (1947).

The Alabama legislature obviously intended to give great weight to the findings and orders of the Commission. The

Alabama legislature refused to allow the courts to substitute an independent judgment for that of the Commission. Nevertheless, this carefully devised legislative plan has been completely destroyed by the opinions and holdings of the two three-judge courts from which the instant appeals have been taken. If this Court affirms the decisions below, the field of operation for the Alabama administrative procedure just described will be virtually eliminated. There is no question that the courts below have substituted very severe independent judgments for the judgments of the Commission. Surely, if the Eleventh Amendment is to retain its efficacy, it should apply in the cases at bar.

A further policy reason exists which militates toward a reversal of the decisions below on Eleventh Amendment grounds. In order to sustain the action of the lower court from Eleventh Amendment attack, the so-called "stripping doctrine" of **Ex parte Young**, 209 U. S. 123, supra, must be invoked. **Ex parte Young** set out this doctrine where a statute was unconstitutional. The doctrine is certainly dangerous to state officials, since they may be liable in damage suits and in suits under the Federal Civil Rights Act (8 U. S. C. A., Sec. 43) for enforcing a statute as a matter of duty, which is later held unconstitutional. Certainly, **Ex parte Young** goes far enough. Its doctrine should not be extended to negative quasi-judicial orders of administrative bodies which are alleged to be violative of the Federal Constitution.

For the reasons set out in this section of the brief it is apparent that the instant suits are, in substance, actions against the State of Alabama, and as such, are barred by the Eleventh Amendment to the Federal Constitution. The three-judge district courts below erred in failing to dismiss the suits on that ground.

II.

The Lower Court Should Have Abstained From Exercising Jurisdiction in the Cause at Bar.

Without waiving the argument in the preceding section of this reply Brief, the appellants contend that the lower court should have abstained from exercising any jurisdiction which it may have possessed, until the cause had been litigated in the courts of Alabama pursuant to Tit. 48, secs. 79 et seq., Code of Alabama 1940. Although this proposition has been argued in the original Briefs filed in No. 146 and in No. 395, appellants will now seek to expand that argument in reply.

The lower court in No. 395 did not follow significant decisions of this Court holding that lower Federal courts should not exercise their jurisdiction in cases such as this until there had been adjudication in the State courts (R. 51):

Shipman v. Dupre, 339 U. S. 321 (1950);
Railroad Comm. of Texas v. Pullman Co., 312 U. S. 496 (1941);
Burford v. Sun Oil Co., 319 U. S. 315 (1943);
Stainback v. Mo Hock Me Lok Po, 336 U. S. 368 (1949);
Chicago v. Fieldcrest Dairies, 316 U. S. 168 (1942);
AFL v. Watson, 327 U. S. 582 (1946);
Hillsborough v. Cromwell, 326 U. S. 620 (1945).

The lower court felt that all these cases were distinguishable at bar as involving situations where the state law was "novel, ambiguous or undecided" (No. 395, R. 51). The lower court observed, on the other hand, that "defendants cite no ambiguous, novel or undecided State law involved herein" (No. 395, R. 52). Further: "The Alabama law requires no definitive construction of authori-

tative interpretation. **Alabama Public Service Commission v. Atlantic Coast Line R. Co.**, supra" (No. 395, R. 52).

Two basic errors are apparent. First, Alabama law on the subject, as set forth in **Alabama Public Service Comm. v. Atlantic Coast Line R. Co.**, 253 Ala. 559, 45 So. 2d 449 (1950), is not so clear and unambiguous as applied to the situations at bar. Second, the cases of this Court are not susceptible of such easy grouping. Mr. Justice Frankfurter, the author of **Railroad Comm. v. Pullman Co.**, supra, dissented in **Burford v. Sun Oil Co.**, supra, on the ground that the latter went beyond the former, and went too far. Thus, it is reasonable to assume that novelty and ambiguity in State law are not absolute prerequisites under the **Burford** rule. This Court there invoked abstention out of deference to the State administrative process. (See: Braucher, **The Inconvenient Federal Forum** [1947], 60 Harv. L. Rev. 908, 923; and Note 56 Harv. L. Rev. 1162.)

The lower court in No. 395 decided, as conclusions of law, that the Commission's order violated the Fourteenth Amendment of the Federal Constitution as a confiscatory order (R. 70), and that there was no imperative duty under Alabama law requiring continued operation of the branch line (R. 69). Nevertheless, the lower court made no finding as to the effect of the overall system profits and losses on the situation at bar. But, the Alabama case of **Alabama Public Service Comm. v. A. C. L. R. Co.**, 253 Ala. 559, 45 So. 2d 449 (1950), clearly distinguished a "due process" case (where system profits require continuance) from an Alabama "public convenience and necessity" case (where the carrier is **not** required to show that the rate of return on the system militates toward a reduction in service). Therefore, the Alabama Supreme Court, without having considered burden on the system as a whole, would not have decided the instant cases on Fourteenth Amendment grounds. Yet, the lower court, apparently applying settled and "unambiguous" Alabama law, de-

cided these cases on BOTH "convenience and necessity" and "due process" grounds.

The error in applying, as settled Alabama law, the general statements and dicta of the **Atlantic Coast Line** case, supra, does not end here. That case held that the railroad involved might **not** curtail its branch line service. Consequently, no settled and unambiguous Alabama law stems from a holding in accord with the holdings of the lower courts in the cases at bar (Nos. 146 and 395). Also, even if dictum is to become settled law, certain factors important in the **Atlantic Coast Line** decision were not considered in the instant cases. There is no comment below concerning the possibility of an increased rate structure; there is no finding as to possibilities of economy. Yet the Alabama court stated:

> "If petitioner is unable to secure redress before the commission in the matter of its rate structure here applicable and to make available economies so as to provide a net profit, the remedy is not to shift its effect to a reduction of this service, so long as the entire system as a whole would not be materially affected by a continuance of the service, and the inconvenience of one would offset the burden of the other" (253 Ala. 564, 45 So. 2d 453).

The second error of the lower court, as exhibited in its opinion in No. 395, is its failure to observe the difference between **Pullman**, 312 U. S. 496, and **Burford**, 319 U. S. 315. Even if Alabama law were not in doubt, **Burford** does not make novelty and ambiguity in State law a requirement for the doctrine of abstention. The principal emphasis in **Burford** concerns non-interference with carefully devised legislative schemes of administrative policy and procedure.

> "The State provides a unified method for the formation of policy and determination of cases by the Com-

mission and by the State courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here . . . (citation) . . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

(**Burford v. Sun Oil Co.**, 319 U. S. 315, 333-334.)

Conflicts "dangerous to the success of state policies" have certainly resulted from the intervention of the lower federal court in the case at bar. It has issued permanent injunctions against action by Alabama administrative officials regarding the railroad lines here involved. No conceivable changed circumstances would mitigate a contempt citation if Alabama administrative officials took such future action. The lower court has substituted its independent judgment for that of the Alabama Commission. Yet, the Alabama legislature, in a carefully devised regulatory scheme, had severely limited the scope of the review which the Alabama courts may exercise over actions of the Alabama Public Service Commission. See: Tit. 48, Secs. 79 et seq., Code of Alabama 1940; **Avery Freight Lines v. Persons**, 250 Ala. 40, 32 So. 2d 886 (1947); **Alabama Public Service Comm. v. Atlantic Coast Line R. Co.**, 253 Ala. 559, 45 So. 2d 449 (1950). And neither the appellee, Southern, nor the lower court has attacked the Alabama review procedures as inadequate.

The **Burford** case, 319 U. S. 315, requires reversal of the action of the lower courts in the cases at bar, for the clear purpose of that case is to restrain the exercise of federal

jurisdiction where a policy-administering function of a state court is to be protected. See: 56 Harv. L. Rev. 1162, 1163 (1943).

The instant decisions of the lower court are fraught with difficulties. Of foremost importance is the fact that administrative actions as to the lines in question are completely and permanently stultified, the most extreme changed circumstances in the area notwithstanding. Furthermore, there is certainly a possibility that the Alabama courts might reach a decision, in a similar factual setting, different from the decisions reached by the lower court. Then, a distinct dualism would exist concerning administrative policy toward discontinuance of branch railroad lines.

The lower court has sat in judgment on the entire legislative scheme for the regulation of public service companies. And the Alabama courts have had no opportunity to participate in such judgment, even though the Alabama legislature had made its courts an integral part of the scheme. There is always potential friction between state policy and the federal judiciary. Alabama, through its statutes and its Commission, has developed a well-defined policy toward the discontinuance of railway lines. The permanent injunctions in the lower court have made this potential friction a reality. For the lower court has become the architect of Alabama domestic policy concerning railroads and other public service corporations. (The impact of the decision below obviously extends beyond discontinuance of branch railroad lines.)

Appellants submit that the doctrine of forum non conveniens, developed to accommodate private litigants, witnesses and jurors, should make this case an a fortiori one. That doctrine has now been adopted by Congress. 62 Stat. 937, 28 U. S. C. A., Sec. 1404 (a). See: **Ex parte Collett**, 337 U. S. 55 (1949), and cf. **Missouri ex rel. Southern Ry.**

Co. v. Mayfield, . . . U. S. . . ., . . . S. Ct. . . ., 95 L. ed. (Adv. Op.) 6 (1950). This Court, indeed, has analogized the **Pullman** and **Burford** doctrines to forum non conveniens:

> "On substantially forum non conveniens grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state. **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570; **Burford v. Sun Oil Co.**, 319 U. S. 315; but cf. **Meredith v. Winter Haven**, 320 U. S. 228."
>
> (**Gulf Oil Corp. v. Gilbert**, 330 U. S. 501, 505 [1947].)

Certainly the public policy involved where the federal courts have interfered with state administrative policy and procedure should appeal more strongly to this Court than the inconvenience of a particular forum to litigants and witnesses.

> "In **Gulf Oil Corp. v. Gilbert**, Mr. Justice Jackson repeated his extrajudicial statement that such cases were decided on 'substantially' forum non conveniens grounds. But dismissal or stay of suits in equity, where such suits threaten grave interference with state governmental activity, does not involve geographical convenience, for the Court has expressly recognized that greater discretion to withhold relief exists where public interest is involved than where only private interests are in issue. Some of the decisions are adequately explained by the Supreme Court's reluctance to decide constitutional questions unnecessarily. Others have been treated as refusing 'an extraordinary remedy' because of 'considerations of policy,' thus suggesting that the remedy rather than the forum was deemed inappropriate."
>
> (Braucher, **The Inconvenient Federal Forum** [1947], 60 Harv. L. Rev. 908, 923 f.)

Powerful policy considerations dictate a reversal of the lower court on the ground that it should have withheld the exercise of such equity jurisdiction as it might have had.

This Court in the **Pullman** case, the **Burford** case and in **Meredith v. Winter Haven**, 320 U. S. 228, 235 (1943), as well as in other cases, has enumerated many instances where a federal court should stay its hand. A recent decision of the Court of Appeals for the Third Circuit has recognized the "delicate matter of the balance between state and national authority." **Cooper v. Hutchinson** (3rd Cir., 1950), 184 F. 2d 119, 124 f. In that case the presiding judge at a murder trial in New Jersey, after having granted admission of out-of-state counsel to defend the appellants, withdrew permission for the out-of-state counsel to be admitted pro hac vice. The appellants then sought an injunction in the federal district court under the Civil Rights Act (8 U. S. C., Sec. 43), alleging that the trial judge had arbitrarily denied to them counsel of their own choice, and asking that the trial judge be prohibited from taking further action until the out-of-state counsel had been readmitted. The defendant judge's motion to dismiss was granted by the district court on the ground that the complaint alleged no basis for equitable jurisdiction. On appeal, the instant case held that the district court should retain jurisdiction **pending determination of appellant's rights by the New Jersey courts.**

Appellants insist again that the lower courts erred in refusing to invoke the doctrine of abstention in the cases at bar.

CONCLUSION.

It is respectfully submitted that the decrees of the district court in both cases, No. 146 and No. 395, should be reversed and the causes ordered dismissed; or, in the alternative, that the decrees should be reversed and the

causes remanded with orders that the district court stay the causes pending adjudication in the State courts of the issues of constitutionality and statutory interpretation which are involved.

Respectfully submitted,

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I hereby certify that a copy of this brief has this day been served upon Marion Rushton, Esq., of Counsel for Appellee, this the .... day of February, 1951.

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Of Counsel for Appellants.